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DON BORG

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

DON BORG,

Plaintiff,

vs.

PRINCIPAL LIFE INSURANCE
COMPANY, TARGET
CORPORATION, and DOES 1 through
20, inclusive,

Defendants.

No. 07-CV-03149 HRL

MEMORANDUM OF POINTS
AND AUTHORITIES
IN OPPOSITION TO DEFENDANTS'
MOTION FOR DISMISSAL OF THE
COMPLAINT

Hearing Date: October 2, 2007
Time: 10:00 a.m.
Place: Courtroom 2.
Judge: Hon. Harold R. Lloyd

1 I. INTRODUCTION

2 At this juncture in the proceedings defendants, PRINCIPAL INSURANCE CO., and
3 TARGET CORPORATION, seek dismissal or summary judgment without having answered the
4 complaint.

5 Plaintiff seeks leave of court to amend his complaint in order to more particularly state
6 his claims against the defendants violated plaintiff's constitutional, statutory and common law
7 tort rights to long term disability benefits and the corresponding attempt to defraud the plaintiff
8 out of those rights in an abusive and fraudulent manner. Because these defendants have acted in
9 conspiracy with others to perpetrate this fraud, they must be held accountable.

10 The defendants assert that with respect to the federal claims there are insufficient
11 allegations with respect to fraud. Plaintiff maintains that defendants should be held answerable
12 and liable for all causes of action for conspiring with the other defendants to induce plaintiff to
13 trade away his right to long term disability benefits based on false information.

14 These defendants have conspired to violate plaintiff's rights and take his benefits without
15 due process or equal protection.

16 The defendant also asserts that the plaintiff's complaint contains no false factual
17 assertions and that there is no statement of any misrepresentation that would constitute the tort of
18 fraud.

19 This is clearly not true but to the extent that the court may seek clarification, the plaintiff
20 asks leave to amend to state a claim against the defendants.

21 Modern federal rules of pleading allow a complaint to stand if it can prevail on any theory
22 assuming the facts pled are true. The plaintiff in this action has plainly met that burden and the
23 motion for dismissal must be rejected. Equally the contention of a motion for summary
24 judgment is inapplicable and defendants should be required to answer the complaint.

25 If the court treats this case as a de facto summary judgment motion it should require
26 defendants to go back to the drawing board and file one that comports with FRCP Rule 56.

27 If this Court finds any defects in the complaint, plaintiff requests leave to amend the
28 complaint to cure those defects.

1 If this Court converts this motion into a motion for summary judgment under Federal
2 Rules of Civil Procedure, Rule 56, plaintiff invokes Rule 56(for) and hereby requests at least six
3 months to conduct the necessary discovery to oppose a summary judgment motion consistent
4 with a proper discovery plan.

5 Plaintiff asks for leave to amend the complaint. He avers that in fact, his claim this time
6 is different from the last one in the prior case, and that, inter alia, he has alleged new dates of
7 injury.

8 In a nutshell, the prior case is an appeal from a denial of long term disability based on the
9 “black box” of documents and medical files submitted to the carrier as of a certain date. Under
10 the ERISA law, this court could only consider the documents and evidence in the black box
11 sealed as of that date, but not other documents or subsequent injuries or aggravations or change
12 in medical circumstances.

13 The instant case, by contrast, involves four new dates of injury incurred whilst
14 Borg was still an employee of Target, covered under this long term disability policy. Hence these
15 events all occurred after the deadline for sealing the black box in the earlier case. Hence we have
16 a right to present these new claims.

17 II. STATEMENT OF FACTS

18 Defendant TARGET employed plaintiff on September 25, 2000 and transferred him as
19 Store Team Leader, i.e., manager, to the Mountain View, California store on June 1, 2001.

20 Plaintiff became disabled on February 6, 2003, and became eligible to receive long term
21 disability benefits under his policy with defendants.

22 All of the actions relative to this complaint are within the jurisdiction of the Employee
23 Retirement Security Income Act, (“ERISA”), 29 U.S.C. §1001, et seq., and 28 U.S.C. §1331.
24 The plaintiff has rights within that Act that have not been adequately addressed.

25 On or about the following dates in 2006, including September 7, 2006 and September 10,
26 2006, plaintiff filed four specific claims for long term disability benefits (LTD), and the medical
27 status of his situation WAS such that the medical records and evidence of disability had changed
28 and WAS substantially different, and more ominous medically, than the medical records had

1 been when defendant rejected plaintiff's original ERISA claim. Because plaintiff filed his Long-
2 Term Disability claims 4 times in 2006 based on four different sets of medical situations, body
3 parts and records, defendant violated his ERISA rights by not granting him the dispensation of
4 LTD. Defendants' interminable cunctation, coupled with a cynical and rote form of "automatic
5 LTD denials," violated plaintiff's rights under ERISA.

6 During the interregnum between plaintiff's four separate claims and his prior claim,
7 plaintiff suffered additional injuries and complications which were not and could not have been
8 known to defendants when they rejected his original claim. They did not have the medical
9 evidence and did not seek it, blithely and mindlessly rejecting his claims ipso facto. Plaintiff
10 demonstrated, and the medical records proved, that he WAS totally and permanently disabled
11 and unable to perform duties of a Target store manager ("team leader") because said job required
12 arduous physical stamina and effort, which plaintiff's orthopedic injuries to shoulder, back etc.
13 Rendered impossible. The defendants refused to grant plaintiff LTD status. These actions by
14 defendants and each of them violated the ERISA.

15 As a proximate result of defendants' conduct as explained above, plaintiff has been
16 damaged financially and emotionally, has suffered pain, has lost income and other benefits,
17 health insurance, life insurance, pension plan, has suffered depression, and has incurred great
18 expenses, and other health, employment and career benefits, as well as lost potential income
19 earning ability, all to his detriment in a sum according to proof.

20 The conduct of the defendants described above WAS at all times material hereto,
21 malicious and intentional, and entitles plaintiff to an award of punitive damages. Also plaintiff
22 requests an award of attorney fees under the federal ERISA laws.

23 In or about December 20, 2006, plaintiff WAS induced by defendants' fraud to enter into
24 a settlement agreement with defendants as to a prior LTD claim. The plaintiff WAS fraudulently
25 induced because, inter alia, defendants concealed several actions of the procedure used in their
26 analysis and appeal process in rejecting his LTD claim. Plaintiff WAS also defrauded into
27 signing the agreement because defendants' counsel and agents told him numerous points vis a vis
28 defendants' policies toward claims.

1 There can be no doubt that the plaintiff relied on defendants' misrepresentations to his
2 detriment. He settled for less than he should have gotten. Therefore, there can be no question
3 that plaintiff is entitled to bring this action notwithstanding the prior settlement agreement,
4 because the latter WAS induced by fraud.

5 Plaintiff's reliance on and belief in and acceptance in good faith of all the assurances,
6 promises and representations as listed in the foregoing paragraphs, led plaintiff throughout his
7 employment with defendants to reasonably believe that if plaintiff became disabled he would
8 reap LTD benefits.

9 Defendants committed the acts alleged herein maliciously, fraudulently and oppressively,
10 with the wrongful intention of injuring plaintiff, from an improper and evil motive amounting to
11 malice, and in conscious disregard of plaintiff's rights. Thus, plaintiff is entitled to recover
12 punitive damages of \$50 million from each defendant, in an amount according to proof.

13 Plaintiff demands an award of attorney fees because he is fighting to vindicate important
14 public rights that apply to all members of the class of plaintiff suing herein. The blatant
15 violations constitute a violation of public policy and discrimination based on improper motives
16 and a violation of constitutional rights.

17 III. ARGUMENT

18 A. Standard of Review

19 All of the principles of modern pleading support the idea that plaintiff must be allowed to
20 plead its case with the widest latitude, with the benefit of all doubts and all contentions or
21 ambiguities resolved in its favor

22 Courts view Federal Rules of Civil Procedure, Rule 12(b)(6) motions with disfavor
23 because of the role pleadings play in federal practice, the liberal policy toward amendment of the
24 pleadings and the right of a plaintiff to present his case on any theory that has a chance of
25 success. "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely
26 granted." Gilligan v. Jamco Development Corp. 108 F.3d 246, 249 (9th Cir., 1997). See also,
27 Colaprico v. Sun Microsystems, Inc. 758 F.Supp. 1335, 1339, (N.D., 1991).

28 Similarly, this jurisdiction has held that a dismissal under Rule 12(b)(6) is proper only in

1 extraordinary circumstances. United States v. Redwood City 640 F.2d 963, 966 (9th Cir., 1981).

2 For our purposes here the case of Bennett v. Schmidt 153 F.3d 516 is even more
3 instructive. The court in Bennett, at 518, said:

4 “Instead of lavishing attention on the complaint until the plaintiff
5 gets it just right, a district court should keep the case moving – if
6 the claim is unclear, by requiring a more definite statement under
Rule 12(e), and if the claim is clear but implausible, by inviting a
motion for summary judgment.”

7 In addition, it has long been held that the complaint must be construed in the light most
8 favorable to plaintiff. Any doubt as to whether a claim is valid is resolved in favor of plaintiff.
9 (Parks School of Business, Inc. v. Symington 51 F.3d 1480, 1484 (9th Cir., 1995).) On the same
10 point the United States Supreme Court, in Conley v. Gibson 355 U.S. 41, 45-46, 78 S.Ct. 99, 102
11 (1957), has said:

12 “A complaint should not be dismissed for failure to state a claim
13 unless it appears beyond a doubt that the plaintiff can prove no set
of facts in support of his claim which would entitle him to relief.”

14 The question of plaintiff’s ability to prove his allegations is not at issue in a motion for
15 dismissal under Rule 12(b)(6). For example, in citing a US Supreme Court case, the court in
16 Nami v. Fauver 82 F.3d 63, 65 (3rd Cir., 1996) said:

17 “We must determine whether, under any reasonable reading of the
18 pleadings, the plaintiffs may be entitled to relief, and we must
19 accept as true the factual allegations in the complaint and all
reasonable inferences that can be drawn therefrom. [citation
20 omitted] The complaint will be deemed to have alleged sufficient
facts if it adequately put the defendants on notice of the essential
21 elements of the plaintiffs’ cause of action. Since this is a Section(s)
1983 action, the plaintiffs are entitled to relief if their complaint
22 sufficiently alleges deprivation of any right secured by the
Constitution. Id. In considering a Rule 12(b)(6) motion, we do not
23 inquire whether the plaintiffs will ultimately prevail, only whether
they are entitled to offer evidence to support their claims. Scheuer
v. Rhodes, 416 U.S. 232, 236 (1974).”

24 With respect to the issue that the court must accept as true all material allegations in the
25 complaint, as well as reasonable inferences to be drawn from them, even if they are unlikely, see
26 also, Pareto v. F.D.I.C. 139 F.3d 696, 699 (9th Cir., 1998).

27 The point here is that the standard that defendant must reach to dismiss the claims for
28 failure to state a cause of action are very high. Defendant has clearly failed to meet its burden as

1 we will demonstrate below.

2 B. Scope of Prior Agreement Did Not Include Present Claims

3 It is incontrovertible, that during the interregnum between plaintiff's four separate claims
4 and his prior claim, plaintiff suffered additional injuries and complications which were not and
5 could not have been known to defendants when they rejected his original claim.

6 Plaintiff asks for leave to amend the complaint. He avers that, in fact, his claim this time
7 is different from the last one in the prior case, and that, inter alia, he has alleged new dates of
8 injury.

9 In a nutshell, the prior case involved appeal from a long term disability denial based on
10 the "black box" of documents and medical files submitted to the carrier as of a certain date.
11 Under the ERISA law, this court could only consider the documents and evidence in the black
12 box sealed as of that date, but not other documents or subsequent injuries or aggravations or
13 change in medical circumstances.

14 The instant case, by contrast, involves four new dates of injury incurred whilst
15 Borg was still an employee of Target, covered under this LTD policy. Hence these events all
16 occurred after the deadline for sealing the black box in the earlier case. Hence we have a right to
17 present these new claims.

18 C. Fraud Claims Are Stated with Particularity

19 The fraud claims are stated with sufficient particularity for the defendants to understand
20 the nature of the fraud. That is all that is required.

21 It is true that under Federal Rules of Civil Procedure, Rule 9(b) requires that allegations
22 of fraud be stated with particularity. It is also true that "particularity" is taken to mean the who,
23 what, when, where and how of the fraud in question. But that is laid out in the complaint
24 already. We have stated the dates on which the fraudulent actions took place deprive the plaintiff
25 of his rights to long term disability benefits based on information that WAS false and that he
26 unjustly relied upon. This fraud subjected the plaintiff to considerable harm to his assets,
27 livelihood and career.

28 We have already described the kinds of statements that lead to the fraud and the

1 fraudulent inducement of the prior agreement and the fact that the scope of the agreement did not
2 include the present claims.

3 We stand ready to amend the complaint to supply even greater detail and request leave to
4 do so if necessary, but it should not be necessary. Defendants understand very well the charge of
5 fraud laid against them in the complaint.

6 D. The Defendant Has Inflicted Emotional Distress on Plaintiff

7 Plaintiff alleges and will seek to prove that the conduct of defendants WAS in fact
8 malicious, outrageous and intentionally calculated to inflict emotional distress.

9 A claim of intentional infliction of emotional distress requires a plaintiff to show (1)
10 extreme and outrageous conduct by the defendant with the intention of causing, or reckless
11 disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or
12 extreme emotional distress; (3) and actual and proximate causation of the emotional distress by
13 the defendant's outrageous conduct." See, Cervantez v. J.C. Penney Co. (1979) 24 Cal.3d 579.

14 How malicious, outrageous and extremely beyond the bounds of common decency it is
15 can be alleged specifically and plaintiff stands ready to amend the complaint to show exactly how
16 the actions

17 But the allegations supporting the cause of action for infliction of emotional distress are
18 not legal questions subject to a motion for dismissal. Rather, they are a matter to proof at trial or,
19 at the very minimum, subject to challenge at summary judgment. But in a motion to dismiss the
20 allegations of plaintiff should be taken at face value. It is one of the standards of a motion to
21 dismiss that all allegations of the non-moving party are assumed to be true for the purposes such
22 a challenge. It only at trial that the relative truth of the allegations are weighed.

23 The standard for granting leave to amend is very liberal. If there is a possibility that a
24 complaint can be effectively amended, leave should be granted to do so.

25 The plaintiff hereby request leave of court to amend the complaint to more adequately
26 plead the allegations that constitute infliction of emotional distress.

27 E. Standard For Leave to Amend is Liberal

28 The standard for granting leave to amend is very liberal. If there is a possibility that a

1 complaint can be effectively amended, leave should be granted to do so.

2 Plaintiff requests leave of court to amend the complaint in order to describe in detail the
3 identities of defendants' agents, employees, and officers who made false statements to plaintiff
4 which constitute fraud, detailed verbatim renditions of the actual misrepresentations uttered by
5 defendants' agents and specific dates and locations where the fraudulent statements were made.

6 Federal Rule of Civil Procedure, Rule 15 requires the court to adopt a very liberal policy
7 toward giving a plaintiff leave to amend the complaint at least once.

8 The underlying principle is the interest in serving justice. A district court must grant
9 leave to amend freely when justice so requires. This policy is to be applied with extreme
10 liberality. Lopez v. Smith 203 F.3d 11122, 1130 (9th Cir. 2000). Moronogo Band of Mission
11 Indians v. Rose 893 F.3d 1074, 1079 (9th Cir. 1990).

12 In exercising its discretion whether to grant leave to amend, the court should be guided by
13 the underlying purpose of allowing amendments which will facilitate the parties obtaining a
14 judgment on the merits of the action. Filmtec Corp. V. Hydranautics 67 F.3d 931, 935 (Fed. Cir.
15 1995), cert. denied., 519 U.S. 814 (1996) citing DCD Programs, Ltd. v. Leighton 833 F.2d 183.

16 In fact, it has been held that the policy that a court should freely grant amendments limits
17 a court's ability to deny leave to amend, and in a proper case, may warrant a finding of abuse of
18 discretion in denying leave. It WAS an abuse of discretion to deny leave to amend a complaint
19 where plaintiffs were trying in good faith to amend to meet heightened pleading standards
20 applicable to securities fraud actions. See, Eminence Capital, LLC. V. Aspeon, Inc. 316 F.3d
21 1048, 1051-1053 (9th Cir. 2003)

22 In this case, should the court find any defect in the complaint, the plaintiff, Stanley
23 Hilton, hereby requests leave of court to amend the complaint under this very liberal standard to
24 encourage judgment on the merits.

25 IV. CONCLUSION

26 Therefore, the overwhelming conclusion is that the plaintiff has stated facts sufficient to
27 meet the threshold of pleading for claims violation right to long term disability and for fraud. A
28 motion to dismiss under Rule 12(b)(6) is completely inappropriate because plaintiff should be

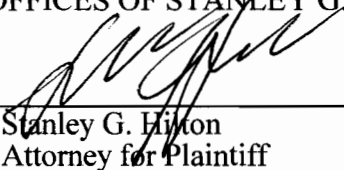
1 allowed to conduct discovery to prove his claims. For the same reason, a motion for summary
2 judgment would be highly inappropriate as defendants have not answered and plaintiff must be
3 granted time, at the very least to conduct discovery as to the facts.

4 The motion for dismissal should be rejected by this court and the defendants should be
5 required to answer the complaint.

6 DATED: September 12, 2007

LAW OFFICES OF STANLEY G. HILTON

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8 By


Stanley G. Hilton
Attorney for Plaintiff